UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FREDERICK AMBROSE WARE III,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting Commissioner of Social Security,

Defendant.

No. 2:21-cv-00203 AC

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner"), denying his application for disability insurance benefits ("DIB") under Title II of the Social Security Act ("the Act"), 42 U.S.C. §§ 401-34.[1] For the reasons that follow, plaintiff's motion for summary judgment will be GRANTED, and defendant's cross-motion for summary judgment will be DENIED. The matter will be reversed and remanded to the Commissioner for further proceedings.

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[1] DIB is paid to disabled persons who have contributed to the Disability Insurance Program, and who suffer from a mental or physical disability. 42 U.S.C. § 423(a)(1); Bowen v. City of New York, 476 U.S. 467, 470 (1986).

I. PROCEDURAL BACKGROUND

Plaintiff applied for DIB on March 29, 2018. Administrative Record ("AR") 171-175.[2] The disability onset date was alleged to be January 17, 2017. Id. The application was disapproved initially and on reconsideration. AR 100, 105-116. On August 18, 2014, ALJ Sara Gillis presided over the hearing on plaintiff's challenge to the disapprovals. AR 37-67 (transcript). Plaintiff, who appeared with his counsel David Shore, was present at the hearing. AR 37. Robin Scher, a Vocational Expert ("VE"), also testified at the hearing. Id.

On August 4, 2020, the ALJ found plaintiff "not disabled" under Sections 216(i) and 223(d) of Title II of the Act, 42 U.S.C. §§ 416(i), 423(d). AR 12-32 (decision), 33-36 (exhibit list). On December 2, 2020, the Appeals Council denied plaintiff's request for review, leaving the ALJ's decision as the final decision of the Commissioner of Social Security. AR 1-5 (decision and additional exhibit list).

Plaintiff filed this action on February 2, 2021. ECF No. 1; see 42 U.S.C. § 405(g). The parties consented to the jurisdiction of the magistrate judge. ECF No. 14. The parties' cross-motions for summary judgment, based upon the Administrative Record filed by the Commissioner, have been fully briefed. ECF Nos. 18 (plaintiff's summary judgment motion), 19 (Commissioner's summary judgment motion), 22 (plaintiff's reply).

II. FACTUAL BACKGROUND

Plaintiff was born in 1960 and accordingly was a person of advanced age under the regulations when he filed his application.[3] AR 41. Plaintiff has at least a high school education, and can communicate in English. Id. Plaintiff worked as an outside sales representative from October 2002 through January 2017. AR 196.

III. LEGAL STANDARDS

The Commissioner's decision that a claimant is not disabled will be upheld "if it is supported by substantial evidence and if the Commissioner applied the correct legal standards." Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1011 (9th Cir. 2003). "'The findings of the

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[2] The AR is electronically filed in OCR format at ECF No. 12-2 (AR 1 to AR 692).

[3] See 20 C.F.R. § 404.1563(e) ("person of advanced age").

Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . ..'" Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995) (quoting 42 U.S.C. § 405(g)).

Substantial evidence is "more than a mere scintilla," but "may be less than a preponderance." Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). "It means such evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (internal quotation marks omitted). "While inferences from the record can constitute substantial evidence, only those 'reasonably drawn from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted). Although this court cannot substitute its discretion for that of the Commissioner, the court nonetheless must review the record as a whole, "weighing both the evidence that supports and the evidence that detracts from the [Commissioner's] conclusion." Desrosiers v. Secretary of HHS, 846 F.2d 573, 576 (9th Cir. 1988); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985) ("The court must consider both evidence that supports and evidence that detracts from the ALJ's conclusion; it may not affirm simply by isolating a specific quantum of supporting evidence.").

"The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities." Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001). "Where the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld." Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). However, the court may review only the reasons stated by the ALJ in his decision "and may not affirm the ALJ on a ground upon which he did not rely." Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007); Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003) ("It was error for the district court to affirm the ALJ's credibility decision based on evidence that the ALJ did not discuss").

The court will not reverse the Commissioner's decision if it is based on harmless error, which exists only when it is "clear from the record that an ALJ's error was 'inconsequential to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v. Commissioner, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

IV. RELEVANT LAW

Disability Insurance Benefits and Supplemental Security Income are available for every eligible individual who is "disabled." 42 U.S.C. §§ 402(d)(1)(B)(ii) (DIB), 1381a (SSI). Plaintiff is "disabled" if she is "'unable to engage in substantial gainful activity due to a medically determinable physical or mental impairment . . ..'" Bowen v. Yuckert, 482 U.S. 137, 140 (1987) (quoting identically worded provisions of 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A)).

The Commissioner uses a five-step sequential evaluation process to determine whether an applicant is disabled and entitled to benefits. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Barnhart v. Thomas, 540 U.S. 20, 24-25 (2003) (setting forth the "five-step sequential evaluation process to determine disability" under Title II and Title XVI). The following summarizes the sequential evaluation:

> Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.

20 C.F.R. § 404.1520(a)(4)(i), (b).

> Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, the claimant is not disabled.

Id. §§ 404.1520(a)(4)(ii), (c).

> Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P, App. 1? If so, the claimant is disabled. If not, proceed to step four.

Id. §§ 404.1520(a)(4)(iii), (d).

> Step four: Does the claimant's residual functional capacity make him capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

Id. §§ 404.1520(a)(4)(iv), (e), (f).

> Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Id. §§ 404.1520(a)(4)(v), (g).

The claimant bears the burden of proof in the first four steps of the sequential evaluation process. 20 C.F.R. §§ 404.1512(a) ("In general, you have to prove to us that you are blind or

disabled"), 416.912(a) (same); Bowen, 482 U.S. at 146 n.5. However, "[a]t the fifth step of the sequential analysis, the burden shifts to the Commissioner to demonstrate that the claimant is not disabled and can engage in work that exists in significant numbers in the national economy." Hill v. Astrue, 698 F.3d 1153, 1161 (9th Cir. 2012); Bowen, 482 U.S. at 146 n.5.

V. THE ALJ's DECISION

The ALJ made the following findings:

> 1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2023.
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> 2. [Step 1] The claimant has not engaged in substantial gainful activity since January 17, 2017, the alleged onset date (20 CFR 404.1571 et seq.).
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> 3. [Step 2] The claimant has the following severe impairments: lumbar and cervical degenerative disk disease, diabetes mellitus with peripheral neuropathy, obesity, and venous insufficiency of the lower extremities (20 CFR 404.1520(c)).
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> 4. [Step 3] The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and 404.1526).
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> 5. [Residual Functional Capacity ("RFC")] After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) except the claimant can occasionally climb, stoop, kneel, crouch, or crawl. He can frequently balance and frequently feel with the bilateral upper extremities.
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> 6. [Step 4] The claimant is capable of performing past relevant work as a sales representative/industrial machinery. This work does not require the performance of work-related activities precluded by the claimant's residual functional capacity (20 CFR 404.1565).
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> 7. The claimant has not been under a disability, as defined in the Social Security Act, from January 17, 2017, through the date of this decision (20 CFR 404.1520(g)).

AR 17-32.

As noted, the ALJ concluded that plaintiff was "not disabled" under Title II of the Act. AR 32.

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VI. ANALYSIS

Plaintiff alleges that the ALJ erred in four primary respects: (1) by failing to properly consider plaintiff's subjective testimony; (2) by failing to consider the third-party testimony of Jennifer Ware; (3) by failing to properly consider plaintiff's alleged trigger finger, bilateral shoulder impingement, depression, and hearing loss as severe impairments at step two; and (4) improperly discounting physician opinions. ECF No. 18 at 6-13. Plaintiff argues the failures were harmful, and that the case should be remanded to the Commissioner for further proceedings. Id. at 18.

A. The ALJ Improperly Rejected Plaintiff's Subjective Testimony

The ALJ improperly rejected plaintiff's subjective testimony regarding his pain and impairments. Evaluating the credibility of a plaintiff's subjective testimony is a two-step process. First, the ALJ must "determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged. . . . In this analysis, the claimant is not required to show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." Garrison v. Colvin, 759 F.3d 995, 1014 (9th Cir. 2014) (internal citations omitted). Objective medical evidence of the pain or fatigue itself is not required. Id. (internal citations omitted). Second, if the ALJ does not find evidence of malingering, the ALJ may only reject the claimant's testimony by offering "specific, clear and convincing reasons for doing so." Id. (internal citations omitted).

Here, the ALJ recognizes that plaintiff reported that he cannot drive for more than two hours without pain, and that he takes medications three to four times weekly, including a muscle relaxer, that prevent him from driving. AR 22. The plaintiff also reported low back pain with occasional foot or ankle pain, and occasional ankle collapse causing falls. Id. Plaintiff also reported neuropathy, and gout affecting his hands and feet. Id. With respect to reported daily activity, plaintiff said he can walk up to an hour and sit for up to 30 minutes. Id. Plaintiff reported going to physical therapy, but on those days he requires pain medication afterward. Id. The plaintiff estimated he could lift 20 pounds. Id. Plaintiff has a dog, chickens, geese, and fish

and can feed them, but he has had difficulty in the past walking over uneven terrain and at times has used his 100-pound dog for counterbalance. Id. Plaintiff has used a cane. Id. He can do some cooking and is involved with amateur radio. Id. He can walk his dog and throw a ball for him. Id.

The ALJ concluded plaintiff's statements concerning the intensity, persistence and limiting effect of his symptoms "are not entirely consistent with the medical evidence and other evidence of record for the reasons explained in [the] decision." AR 22. The ALJ's reasons for discounting plaintiff's subjective testimony are legally insufficient. "An ALJ must identify the specific testimony that lacks credibility, provide clear and convincing reasons why the testimony is not credible, and identify the specific evidence in the record which supports the ALJ's determination." Talbot v. Colvin, No. SACV 14-1935 JC, 2015 WL 5826808, at *4 (C.D. Cal. Sept. 30, 2015). Here, it is not clear from her decision which portions of plaintiff's subjective testimony the ALJ accepts and which parts she rejects; instead of linking medical evidence or opinions to the subjective testimony to show how plaintiff's statements are undermined, the ALJ simply moves to an analysis of the medical opinions. AR 22-31. It is not clear from the ALJ's medical opinion analysis that the plaintiff's subjective statements are, in fact, undermined. For example, nothing in the cited medical evidence contradicts plaintiff's complaints of ankle instability leading to falls. Id. There is also no mention of plaintiff's pain medication and its impact on plaintiff's ability to drive. Id.

The Commissioner argues that "the ALJ also reasonably found Plaintiff's reported activities did not support his allegations (AR 18, 22)." ECF No. 19 at 5. The court finds this to be an inaccurate representation of the actual decision. The ALJ does not clearly conclude that plaintiff's daily activities contradict his subjective pain statements, she simply lists his reported daily activities. AR 18, 22. Further, on their face, the reported activities do not appear to contradict plaintiff's testimony. Because the ALJ did not provide specific, clear, or convincing reasons for discounting plaintiff's subjective testimony, the court finds error.

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B. Third-Party Statement was Not Properly Considered

An ALJ must consider lay testimony as to a plaintiff's symptoms unless she provides reasons germane to the witness for disregarding it. Lewis v. Apfel, 236 F.3d 505, 511 (9th Cir. 2001) ("Lay testimony as to claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so."). Here, the ALJ noted that plaintiff's wife, Jennifer Mills Ware, submitted a statement in which she said plaintiff's pain and medication kept him from doing activities that he previously enjoyed, caused him to constantly change position, prevented him from driving more than two hours, and caused difficulty with his daily self-care and hygiene needs. AR 31. The ALJ noted that Ms. Ware said plaintiff could make frozen meals, do some laundry, sweep while sitting down, walk one block, and shop twice weekly. Id. The ALJ stated that she was not required to consider how consistent, supported, and persuasive this non-medical testimony is (as she would be required to do with medical testimony), and instead concluded that "per the analysis of persuasiveness of the medical opinions above, [the] statement [is] not persuasive." AR 31. As with the rejection of plaintiff's subjective testimony, this is not sufficient. No germane reason is given for rejecting Ms. Ware's testimony. Again, an example of a gap in the medical opinion analysis includes the issue of plaintiff's medication and its impact on his ability to drive and complete activities. The ALJ erred by failing to give germane reasons for rejecting Ms. Ware's third-party report.

C. Error at Step Two

"The step-two inquiry is a de minimis screening device to dispose of groundless claims." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). The purpose is to identify claimants whose medical impairment is so slight that it is unlikely they would be disabled even if age, education, and experience were taken into account. Bowen v. Yuckert, 482 U.S. 137, 153 (1987). At step two of the sequential evaluation, the ALJ determines which of claimant's alleged impairments are "severe" within the meaning of 20 C.F.R. § 404.1520(c). "An impairment is not severe if it is merely 'a slight abnormality (or combination of slight abnormalities) that has no more than a minimal effect on the ability to do basic work activities.'" Webb v. Barnhart,

433 F.3d 683, 686 (9th Cir. 2005) (quoting Social Security Ruling ("SSR") 96-3p, 1996 SSR LEXIS 10 (1996)). The step two severity determination is "merely a threshold determination of whether the claimant is able to perform his past work. Thus, a finding that a claimant is severe at step two only raises a prima facie case of a disability." Hoopai v. Astrue, 499 F.3d 1071, 1076 (9th Cir. 2007). At the second step, plaintiff has the burden of providing medical evidence of signs, symptoms, and laboratory findings that show that his or her impairments are severe and are expected to last for a continuous period of twelve months. Ukolov v. Barnhart, 420 F.3d 1002, 1004-05 (9th Cir. 2005); see also 20 C.F.R. §§ 404.1509, 404.1520(a)(4)(ii), 416.909, 416.920(a)(4)(ii). An ALJ's finding that a claimant is not disabled at step two will be upheld where "there are no medical signs or laboratory findings to substantiate the existence of medically determinable physical or mental impairment." Ukolov, 420 F.3d at 1005.

Here, plaintiff contends the ALJ erred by finding his alleged impairments of trigger finger and bilateral shoulder impingement not medically determinable, and his depression and hearing loss non-severe. ECF No. 18 at 9-12. With respect to trigger finger, the ALJ stated that "[n]o records show diagnosis of trigger thumbs and thus with no objective findings or tests to support a diagnosis, the undersigned finds this is not a medically determinable severe impairment." AR 18. However, plaintiff points out in his briefing that examining physician Dr. David Suchard reported that "Mr. Ware developed bilateral trigger thumbs doing work activities, with symptoms having subsided now that he is no longer performing repetitive hand me activities" and, after noting upon examination "swelling of the proximal interphalangeal joints of both hands and both wrists and decreased tactile sensitivity, proprioception and temperature sensation in the hands," diagnosed plaintiff with stenosing tenosynovitis of the thumbs (trigger finger) in May of 2019. AR 637. The ALJ's rationale for finding plaintiff's trigger finger not medically determinable is not borne out by the record and is error. Because the ALJ found this impairment not medically determinable rather than nonsevere, it was not necessarily calculated into the residual functional capacity. AR 17. Accordingly, this error requires remand.

As to the remaining issues, the court finds no error. Shoulder impingement was not listed as an alleged disabling condition in plaintiff's application. AR 195. Plaintiff's impairments of

depression and hearing impairment were found to be non-severe, but because plaintiff was found to have severe impairments these were nonetheless considered in plaintiff's residual functional capacity. AR 18-20. Any error regarding depression and hearing impairment is therefore harmless. See Buck v. Berryhill, 869 F.3d 1040, 1049 (9th Cir. 2017).

D. Medical Opinions Properly Evaluated

The ALJ properly considered the medical opinions and prior administrative medical findings[4] along with the other record evidence in assessing plaintiff's RFC. AR 28-30.

1. Legal Standard for Evaluating Medical Opinions

The medical opinions and prior administrative medical findings were evaluated in accordance with the revised regulations in 20 C.F.R. § 404.1520c that apply to claims, such as plaintiff's, that are filed on or after March 27, 2017. AR 21, 28-30. Under these revised regulations, the ALJ does not defer or give any specific evidentiary weight to any medical opinions or prior administrative medical findings, including those from a claimant's treating sources. 20 C.F.R. § 404.1520c(a). Instead, all medical opinions and prior administrative medial findings start on equal footing. 20 C.F.R. § 404.1520c(a).

The ALJ then evaluates the persuasiveness of these medical opinions and prior administrative medical findings by considering the factors outlined in 20 C.F.R. § 404.1520c(c)(1)-(5): supportability, consistency, relationship with the claimant (length, frequency of examinations, purpose, extent of treatment relationship, examining relationship), specialization, and other factors. The ALJ must explain how they considered the factors of supportability and consistency, which are the two most important factors in determining the persuasiveness of a medical opinion or prior administrative medical finding and must explain how persuasive they find a medical opinion or prior administrative medical finding to be based on these two factors. 20 C.F.R. § 404.1520c(b)(2). The ALJ is not required to explain how they considered the other factors, unless they find that two or more medical opinions or prior

[4] Under the 2017 revisions to the regulations, state agency medical and psychological consultants' conclusions regarding a claimant's functional capabilities at the initial and reconsideration levels are now referred to as prior administrative medical findings, rather than opinions. See 20 C.F.R. § 404.1513a.

administrative medical findings about the same issue are both equally well-supported and consistent with the record, but not identical. 20 C.F.R. § 404.1520c(b)(2)-(3).

2. Medical Opinions Reviewed

The ALJ reviewed medical opinions from consultative examiner Satish Sharma, M.D. (AR 24-25, 28); treating physician Courtnie Billett, M.D. (AR 23-24, 29-30); independent medical examiner David Suchard, M.D (AR 27-28, 30); treating workers compensation physician Evelyn Fainsztein, M.D. (AR 23, 30); and physical therapist Cary Caulfield (AR 24, 30); as well as the prior administrative medical findings from state agency physicians G. Dale, M.D., and Leigh McCary, M.D. (AR 26, 28).

a. Credited Opinions

Dr. Satish Sharma performed a comprehensive internal medicine evaluation of the claimant on May 21, 2018. AR 598. He reviewed records including a CT angiogram, an October 2007 cervical spine x-ray, and a January 2017 lumbar spine x-ray. AR 386-387, 598-600. Dr. Sharma diagnosed diabetes with peripheral neuropathy, neck pain with intermittent radicular pain in the upper extremities, back pain with intermitted radicular pain in lower extremities, joint pain secondary to osteoarthritis, venous insufficiency of the lower extremities, hypertension, high cholesterol, and gout. AR 601.

Functionally, Dr. Sharma opined the claimant could lift and/or carry 20 pounds occasionally and 10 pounds frequently; could stand and/or walk for six hours in an eight-hour workday; and could stand and/or walk for six hours in an eight-hour workday. He could occasionally bend and stoop; could occasionally climb ramps, stairs, kneel, or crouch; and could frequently feel with the bilateral hands. AR 601. The ALJ found Dr. Sharma's opinion "supported by his diagnoses of diabetes with peripheral neuropathy, neck pain with intermittent radicular pain in the upper extremities, back pain with intermitted radicular pain in lower extremities, joint pain secondary to osteoarthritis, venous insufficiency of the lower extremities, hypertension, high cholesterol, and gout." AR 28. The ALJ found the opinion "consistent with the medical evidence of record showing diagnosis of diabetes, obesity with a body mass index around 38 kg/m^2, and cervical and lumbar x-rays showing degenerative disk disease (11F/17,

18). On exam in 2019 there was decreased sensation in the lower extremities, specifically, the big toe and mid-foot, normal range of motion of the right ankle, with mild swelling and a normal gait consistent with diagnosis of diabetic polyneuropathy (13F/36-38)." Id.

State Agency medical consultant, Dr. G. Dale reviewed the medical evidence of record June 4, 2018, noting the records showed the claimant had gout with some flares, diabetes managed with medications, and no evidence of end organ disease or renal dysfunction. AR 76. Dr. Dale noted plaintiff had normal physical exams in December 2017. Lower extremities showed patent vessels with mild plaque of the right common iliac and moderate plaque in the superior femoral arteries with no evidence of stenosis. Id. Physical therapy was helpful. Id. Imaging showed moderate lumbar and cervical degenerative changes. Records from Dr. Sharma showed the claimant reported he was frequently stumbling, falling, and dropping objects, but Dr. Dale noted no other evidence supporting the statement. Id. He noted that Dr. Sharma's exam showed no edema but did show pain and mild range of motion of the hips and knees with negative straight leg raising tests, with no spasm on exam. Id. He was not using an assistive device but had a right limp. Id. Dr. Dale opined the evidence supported the claimant could lift and/or carry 20 pounds occasionally and 10 pounds frequently. He could stand and/or walk for six hours in an eight-hour workday; could sit for six hours in an eight-hour workday; could occasionally climb, stoop, kneel, crouch, or crawl; could frequently balance; could frequently feel secondary to neuropathy. AR 79. Dr. Leigh McCary reviewed the evidence of record and Dr. Dale's opinion, and supported Dr. Dale's conclusions. AR 26, 98.

b. Discredited Opinions

Dr. Courtnie Billett, plaintiff's treating physician who saw plaintiff every three-to-six months since February 2, 2017, prepared a medical source statement on April 4, 2018. AR 562-565. She treated plaintiff for diabetes, gout, hypertension, dyslipidemia, lumbar degenerative disk disease, edema, and stasis dermatitis. AR 562. Plaintiff's symptoms pertaining to disability were low back pain, knee pain, right lateral foot pain, numbness and tingling in the feet, low back muscle spasms, and muscle tightness in back. Id. Dr. Billett reported the claimant had low back pain and radiation into the legs that was chronic and worsened with prolonged sitting, standing,

and bending. Id. Clinical findings included decreased range of motion in the cervical and lumbar spine and paralumbar muscle tenderness and spasms. Id. The claimant was treated with physical therapy, chiropractic, yoga, heat, icing, and with the medications Norco and Soma. Id.

Functionally, Dr. Billett opined the claimant could lift and/or carry 10 pounds rarely and less than 10 pounds occasionally; could sit for 30 minutes at a time for a total of about two hours in an eight-hour workday; could stand for 20 minutes at a time for a total of about four hours in an eight-hour workday; required the opportunity to shift positions at will from sitting, standing or walking and the opportunity to walk around every thirty minutes for five minutes; would require 15 to 20 minute unscheduled breaks every two to three hours due to pain, paresthesias, numbness, back pain and stiffness, and leg pain; and would require the opportunity to elevate his feet to heart level 50% to 70 % of an eight-hour workday due to venous insufficiency and stasis dermatitis. AR 563-565. He requires use of a cane at times for pain. Id. AR 564. Dr. Billett opined plaintiff could reach overhead 20% of a workday, would likely be off task 25% or more of a workday; was capable of moderate stress; and would likely miss work more than four days per month. AR 564-565.

Following a work-related back injury, plaintiff underwent a physical work performance evaluation on May 1, 2018, performed by Cary Caulfield, a physical therapist at Capitol Physical Therapy. AR 586-592. On exam, the claimant exhibited abnormal range of motion of the lumbar spine, strength was 4/5 in all ranges of motion, and exam of the hands revealed the claimant had full ability to extend and flex (composite) both hands including with thumbs and all fingers. AR 588. The physical therapist opined the plaintiff could exert up to 10 pounds of force occasionally and or negligible amounts of force constantly to move objects; could lift and carry up to 15 pounds (barely) and pull and push up to 10 pounds of force (rarely); could sit frequently (1/2-2/3 of the day); and could occasionally stand and walk (up to 1/3 of the day). AR 591. He had rare tolerance for work requiring arms overhead and occasional tolerances for keyboarding, handling, fingering, and reaching and could frequently feel. Id.

Dr. David Suchard performed an independent medical evaluation of the plaintiff on May 14, 2019. AR 18, 635. He reviewed imaging which showed some underlying degenerative

disc disease but no fractures, and noted a history of conservative treatment with medications, physical therapy and chiropractic. Dr. Suchard noted plaintiff was "briefly released to try return to full work duties [following his back injury] but did not tolerate these." AR 636. On exam he noted moderately restricted cervical motion, mute deep tendon reflexes in the upper extremities, knees, and ankles, significantly reduced active lumbar motion and paralumbar spasm on resuming upright stance, and reduced touch and temperature sensation in the feet and lower legs. AR 637-638. Dr. Suchard opined plaintiff is "capable of performing a mostly seated occupation with maximum exertion of up to 10 pounds, brief periods of standing and walking with allowance for change in position throughout the day. He is able to frequently reach primarily at desk level. He is not, however, capable of performing frequent handling, frequent fingering and/or up to constant keyboard use, associated with his diabetic peripheral neuropathy which affects his hands, swelling of wrists and proximal interphalangeal joints of the fingers, and bilateral trigger thumb condition." AR 639.

The ALJ also noted that Dr. Evelyn Fainsztein, a treating physician related to plaintiff's work injury, gave a time-specific opinion not relevant to ongoing disability. AR 30.

3. The ALJ Did Not Err in Evaluating Medical Opinions

As noted above, the ALJ found Drs. Sharma, Dale, and McCary's opinions persuasive, and Drs. Billett, Suchard, and Caufield's opinions unpersuasive. Upon review, the undersigned finds that the ALJ properly evaluated each medical opinion and remarked upon their consistency and supportability, citing specific evidence in the record. With respect to each discredited doctor, the ALJ found the extent of the limitations provided not consistent with or supported by the medical records, citing extensively to the medical evidence. AR 29-31. The plaintiff provides alternative interpretations of the evidence, but does not identify an instance in which the ALJ failed to provide an analysis of consistency and supportability, or provided a clearly erroneous analysis. ECF No. 18 at 12-16.

"The ALJ is the final arbiter with respect to resolving ambiguities in the medical evidence." Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008). And "if evidence is susceptible of more than one rational interpretation, the decision of the ALJ must be upheld."

Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007). Because the ALJ provided full analyses of the medical opinions, assessing consistency and supportably with ample reference to and interpretation of the medical evidence, the undersigned cannot find error here.

E. Remand

The undersigned agrees with plaintiff that the errors identified above are harmful, and that remand for further proceedings by the Commissioner is necessary. An error is harmful when it has some consequence on the ultimate non-disability determination. Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006). The ALJ's errors in this matter must be considered harmful because plaintiff's subjective testimony, the lay witness testimony, and plaintiff's trigger finger, properly considered, may very well result in a more restrictive residual functional capacity assessment, which may in turn alter the finding of non-disability.

It is for the ALJ to determine in the first instance whether plaintiff has severe impairments and, ultimately, whether he is disabled under the Act. See Marsh v. Colvin, 792 F.3d 1170, 1173 (9th Cir. 2015) ("the decision on disability rests with the ALJ and the Commissioner of the Social Security Administration in the first instance, not with a district court"). "Remand for further administrative proceedings is appropriate if enhancement of the record would be useful." Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004). Here, the ALJ failed to properly consider plaintiff's testimony. Further development of the record consistent with this order is necessary, and remand for further proceedings is the appropriate remedy.

VII. CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (ECF No. 18), is GRANTED;

2. The Commissioner's cross-motion for summary judgment (ECF No. 19), is DENIED;

3. This matter is REMANDED to the Commissioner for further consideration consistent with this order; and

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4. The Clerk of the Court shall enter judgment for plaintiff, and close this case.

DATED: September 9, 2022.

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE